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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Yuba)

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THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN ALBERT OHMER,

Defendant and Appellant.

C087285

(Super. Ct. No. CRF161283)

Defendant John Albert Ohmer pleaded no contest to possession of methamphetamine and heroin while armed. The trial court denied probation and sentenced him to three years in state prison.

On appeal, defendant contends resentencing is required because the trial court misunderstood his eligibility for probation. Based on our review of the record, we conclude the trial court did not misunderstand defendant's probation eligibility and did not abuse its discretion. We will affirm the judgment.

## BACKGROUND

In August 2016, law enforcement served a search warrant at defendant's residence. The search found methamphetamine, heroin and a handgun.

Almost a year later, defendant pleaded no contest to possession of certain controlled substances while armed with a firearm (Health & Saf. Code, § 11370.1) in exchange for dismissal of other counts and allegations. Under the terms of the plea agreement, defendant would receive probation with an "unusual case finding" if he completed a residential rehabilitation program; if defendant failed to complete the program, his plea would be "straight up" with a maximum sentence of four years. At the plea hearing, defense counsel informed the trial court that defendant was having difficulty finding a residential treatment program, but he was hopeful he would find a program willing to take him.

A subsequent letter to the court stated that defendant had been admitted to a Salvation Army program in Marysville but left the program a month later. Another letter said defendant had been admitted to a Salvation Army program in Stockton and he was awaiting a bus ticket for transportation. But at a review hearing, defendant told the trial court he was on a waiting list for the Stockton program.

Defendant failed to appear for the next review hearing and a warrant was issued for his arrest. He explained in a motion to recall the warrant that he had two herniated discs in his back and was unable to come to court.

The trial court sentenced defendant in April 2018. Probation recommended the midterm of three years in prison, reporting that defendant was statutorily ineligible for probation absent an "unusual case finding" due to his prior felonies. The report noted no facts showing defendant's case to be unusual.

According to the probation report, defendant was homeless and received social security disability benefits for various health ailments for which he took medication. He was unable to attend the Stockton Salvation Army program because his health

problems prevented him from complying with the program's work requirement. While the report acknowledged that defendant's physical health might limit him, he was afforded an opportunity at a treatment program at the Salvation Army Depot, but self-discharged shortly after entering the program. Based on the above, defendant had not demonstrated a high likelihood of success.

Defense counsel asked the trial court to place defendant on probation with a condition that he attend a six-month residential rehabilitation program. According to defense counsel, defendant had difficulty finding a treatment program on his own given his medical issues and the need for a program that was not "work-based." Counsel explained that defendant had to leave the Salvation Army program because it was a family program and his wife did not want to stay, adding that defendant was eligible for probation because he only had one prior felony conviction; a second felony conviction was reduced to a misdemeanor. Alternatively, counsel requested the low term of two years because defendant was 60 years old with a methamphetamine habit but a minimal criminal history.

The prosecutor argued the trial court should deny probation. Given the drugs and the firearm found in defendant's possession, as well as an apparent lack of desire to remain in a rehabilitation program, the prosecutor asked the trial court to impose the middle term of three years in prison.

The trial court found that defendant was not a suitable candidate for probation, saying defendant failed to apply himself and made many excuses while the trial court gave him ample time to address his substance abuse through treatment. The following colloquy then occurred:

"[COURT]: Accordingly, the Court concludes the defendant is not a suitable candidate for a grant of probation. I agree with the assessment of the Probation Department in this case. Not necessarily 1203(e)(4) eligible. He has the 11378 from

1998; the 11377 out of Sacramento County has been reduced. And then he has grand theft fourth degree felony according to the FBI from 1979.

“[DEFENSE COUNSEL]: Your Honor, I did want to look into that. I had no way of actually looking into that. There’s no Penal Code or federal code cited for that one. So . . .

“[COURT]: I won’t consider it. I’ll just consider it as an out-of-state matter.

[¶] . . . [¶]

“[COURT]: Probation is denied. Defendant is not an amenable candidate for a grant of probation. Given the gravity of the offense and his inability to apply himself in this matter to even the most easy tasks. Come into court and enter a residential treatment program to prove he could be rehabilitated and be a productive member of society. That didn’t happen. So probation is denied.”

The trial court said it considered the amount of contraband found as an aggravating factor, but defendant’s prior convictions were not numerous or increasing in seriousness, he voluntarily acknowledged wrongdoing at an early stage, and his prior performance on probation had been satisfactory. After finding that the aggravating and the mitigating factors balanced, the trial court imposed the middle term of three years.

#### DISCUSSION

Defendant contends resentencing is required because the trial court misunderstood his eligibility for probation. We review the trial court’s decision whether to grant or deny probation for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.

Penal Code section 1203, subdivision (e)(4)<sup>1</sup> prohibits a court from granting probation to any person who has twice been convicted of a felony in this state unless the court finds that the case is unusual and the interests of justice would best be served by

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

Although the trial court referenced 1203, subdivision (e)(4) at sentencing, it noted that one of defendant's prior felonies had been reduced to a misdemeanor, and it further stated it would not consider another out of state conviction. Rather, the trial court repeatedly indicated defendant was not "amenable" or "suitable" for probation given the gravity of the offense and defendant's inability to apply himself after approximately a year of opportunity. Despite defendant's arguments that the trial court misunderstood his eligibility for probation and then abused its discretion in denying probation, our review of the record confirms the trial court understood defendant's eligibility for probation and properly exercised its broad discretion to deny probation.

The judgment is affirmed.

We concur:

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 RENNER, J.